IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 34

WILLIAM DOUGLAS and BENNIE WILL MEYES,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR PETITIONERS

MARVIN M. MITCHELSON
BURTON MARKS
212 South Gale Drive
Beverly Hills, California
Attorneys for Petitioners

A. L. WIRIN
FRED OKRAND
NANETTE DEMBITZ
of Counsel

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 34

WILLIAM DOUGLAS and BENNIE WILL MEYES,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR PETITIONERS

Re-argument of this case in conjunction with other cases involving the right to counsel, necessitates a brief restatement of the issues presented by these petitioners.

Issues as to Assignment of Trial and Appellate Counsel

1. Petitioners, indigent defendants, were tried jointly and were each convicted on all counts of indictments for 13 felonies.

A Deputy Public Defender, hereinafter called the Public Defender, was assigned to both petitioners jointly for their trial. At the commencement of the trial, the Public Defender moved for a continuance on the ground that he had had insufficient time for preparation; then for appointment

of separate counsel for each defendant on the ground that they had conflicting interests and would be prejudiced by joint representation by one attorney; and, upon the denial of the latter motion, for a continuance for petitioner Douglas to retain counsel. Petitioners contend that the denial of these motions deprived them of the effective aid of counsel for their trials and thus of the due process of law guaranteed by the Fourteenth Amendment.

2. Petitioners appealed their convictions as of right to the intermediate appellate court. That court denied their applications for assignment of counsel to aid them in prosecuting their appeals, stating that no good would be served by such appointment (R. 193).

In its refusal to assign counsel for the appeal, the intermediate appellate court followed the ruling of the highest court of California that a court may, on the appeal of an indigent defendant, examine the record and refuse the aid of counsel unless "it would be helpful to the defendant or the court" in the determination of the case. *People v. Hyde*, 51 Cal. 2d 152, 154, 331 P. 2d 42. See discussion of rule in *People* v. *Brown*, 55 Cal. 2d 64, 69, 77, 375 P. 2d 1072, and Resp. Brief in this Court, pp. 33-38. This rule as here applied, authorizes the denial of counsel though meritorious questions, of complexity and of State and Federal Constitutional right, are presented by the appeal.[1]

Petitioners contend that under the circumstances California's denial of the aid of counsel for their appeals violated the guarantees of equal protection and due process of the Fourteenth Amendment.

---

[1] The Supreme Court of California denied petitions for review by that court, one judge dissenting (R. 194).

I.

Petitioners Were Deprived of the Due Process of Law Guaranteed by the Fourteenth Amendment in That They Were Denied the Effective Aid of Counsel by the Trial Court.

A. Need for Counsel

Argument for the overruling of *Betts* v. *Brady*, 316 U.S. 455, extensively presented in a companion case, will not be reiterated here. In any event, even under the *Betts* ruling petitioners were entitled to the aid of counsel for their trials. Each petitioner's defense required study of the possible evidence for and against him on 12 separate occasions as well as evaluation of the evidence against his co-defendant. (See indictment, R. 1-7.) Furthermore, the most serious count, carrying a possible sentence of 14 years —assault with intent to murder (R. 4; California Penal Code, sec. 217)—presented a refined question of intent. Compare *McNeal* v. *Culver*, 365 U.S. 109, 114-115. And a search for witnesses and other preparations for their defense by petitioners themselves, was impeded by their incarceration in jail, for lack of bail, until the trial (R. 9).

Finally, the past records of the petitioners posed special difficulties as to whether each should testify as well as other evidentiary questions. (Petitioner Meyes had a record of felony convictions, including second-degree murder in connection with the crimes here charged, whereas petitioner Douglas had been acquitted on the murder charge and had no convictions except for a misdemeanor (R. 35-36, 79).)

The record does not show the level of petitioners' schooling. However, even an educated layman would not have the skill and knowledge necessary to cope with the exi-

gencies of defense in this case. A trial without counsel was "so apt to result in injustice as to be fundamentally unfair" and violate due process. *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441.

B. *Effective Aid—Counsel's Opportunity to Prepare*

The right to counsel means the "effective assistance of counsel," and this primarily requires an opportunity for counsel to prepare the defense. *Hawk* v. *Olson*, 326 U.S. 271, 274; *White* v. *Ragen*, 324 U.S. 760, 764. Counsel must have "time and facilities for investigation and for the production of evidence." *Adams* v. *U. S. ex rel. McCann*, 317 U.S. 269, 279.

Need for Continuance and Rulings of Courts Below

Here the Public Defender, moving for a continuance at the opening of the trial because he was insufficiently prepared, stated that he had been continuously on trial on assignment to other defendants since his assignment to petitioners; that the case was complex, involving two defendants and 13 felony counts against each; that the defendants wanted to present alibi defenses which required investigation (R. 29, 34);[2] and that preparation of the defense required his examination of voluminous testimony in a preceding trial in which evidence had been introduced, as to all or some of the robberies here alleged (R. 34, 43). After his motions had been denied, the Public Defender, to moderate his stand, indicated he could study the prior transcript as this trial proceeded (R. 75-76). However, this statement in context, did not reflect real confidence in his preparation even on this one aspect of the case, as much as his view that petitioners were better off with some

[2] The alibi evidence may have been substantial, at least for petitioner Douglas; alibi defenses apparently had been presented in the previous trial for homicide in which he had been acquitted (R. 173).

counsel than *no* counsel: it also smacked of an effort under pressure to defend his professional competence and diligence (R. 75-76).

In denying the motion for a continuance for further preparation, the trial judge indicated no reasons except that the possibility of alibi evidence seemed to him insubstantial (R. 34); that study of the transcript of the prior trial would constitute an unusually high level of preparation (R. 171); and that he was in general impatient with the efforts to secure a continuance (R. 34, 36).

The appellate court, upholding the trial court, did not advert to the Public Defender's grounds for requesting a continuance. Instead, it quoted (R. 184) his moderating remark about his need for preparation, without considering its context; and it ignored his continued assertion, even in his closing remarks and despite pressure: "I would like to be better prepared than I am now" (R. 76). The court concluded: "As the People suggest, . . . defendants were attempting improperly to delay the proceedings by a last-minute dismissal of the public defender" (R. 186).

In view of the appellate court's refusal to appoint counsel for the appeal, the only argument presented to that court on right to counsel appears to have been the State's argument that the motions for a continuance were not made in good faith. (See Petr's brief in this Court, p. 19, quoting the State's brief in the court below.)

Error in Denial of Continuance

Respondent's suggestions of dilatoriness and bad faith in petitioners' motions for a continuance (R. 40, Resp. Br., p. 14) stem from the fact that they followed a motion at the commencement of the trial to disqualify the sitting judge, and that the various motions were not made until the

opening of trial. While the motion to disqualify is unsupported by argument and may appear at first glance a merely dilatory move (R. 28-30), in fact petitioners had substantial reason to fear pre-judgment against them: The judge had presided in a trial where an alleged accomplice had been convicted for the charged crimes (R. 33). Compare *Darcy* v. *Handy*, 351 U.S. 454.

Further, we urge that the right to effective aid of counsel would be dissipated if the Court can deny a continuance despite objective facts showing lack of time for preparation, on the basis of speculation as to counsel's subjective good faith. Finally, assuming the Public Defender was remiss in not making the motions before the trial date—albeit he was on continuous assignments until then—petitioners cannot be deprived because of the dereliction of State-assigned counsel, of their Constitutional right to effective aid of counsel. See *Johnson* v. *United States*, 110 F. 2d 562, 563 (C.A.D.C.); *United States* v. *Handy*, 203 F. 2d 407, 426 (C.A. 3).[3]

The need of the indigent defendant for preparation by his attorney is even greater than that of other defendants, because he generally is, as in the instant case, in jail for inability to furnish bail. See *Equal Justice for the Accused* (Report by a Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association, 1951), p. 35. Approximately eighty jurisdictions now meet the issue of counsel for the indigent through a public defender system, and the need for investigation and preparation is one of the most acute problems in the proper functioning of this system (*ibid.*, pp. 44, 58-60). For a State court to rely on the public defender system but refuse to consider the realities as to the de-

[3] Compare position of "freely-selected" attorney: *Link* v. *Wabash R.R. Co.*, 370 U.S. 626.

fender's opportunity for preparation of a complex case, is not to supply the effective aid of counsel.

"The denial of opportunity for appointed counsel . . . to prepare his defense, could convert the appointment of counsel into a sham . . . " *Avery* v. *Alabama*, 308 U.S. 444, 446. Here the conscientious attempt of the public defender to secure time to meet his obligation to prepare his case, was brushed aside.

C. *Effective Aid—Counsel's Undivided Loyalty to Defendant*

Due process for the defendant requires counsel in a position to give full and effective aid—that is, in a position to accord the undivided loyalty to the defendant's interests that is the accepted obligation of an attorney to his client. Compare *Glasser* v. *United States*, 315 U.S. 60.[4]

The public defender, moving for the appointment of separate counsel for each defendant, pointed out that petitioner Douglas would be prejudiced by joint representation because Meyes had been convicted, and Douglas acquitted, of second-degree murder in connection with the crimes for which they were now indicted. An attorney could not take full advantage of this acquittal for Douglas if he was at the same time trying to protect Meyes (R. 31, 36; see R. 148-9). Not only during the trial but particularly at the time of sentence, it would be important to Douglas for his attorney to stress the difference in their records.[5]

---

[4] The degree to which the lawyer's conduct of the litigation binds his client (see *Link* v. *Wabash R.R. Co.*, *supra*) is one of the factors that engenders the attorney's correlative duty of loyalty.

[5] An advocate's presentation at the time of sentence may have great importance. *Von Moltke* v. *Gillies*, 332 U.S. 708, 721. To assign separate counsel at the sentencing stage, who had no acquaintance with the proceeding, would not insure effective aid. See *Gadsden* v. *United States*, 223 F. 2d 627, 630 (C.A.D.C., 1955).

Consider the need for correction of the prosecutor's erroneous statement (R. 162) that "they" shot a policeman.

Further, Meyes' record of felony convictions as compared to Douglas' clear record (R. 79, 142-3) would bear on whether each should take the stand; and the decision of each would affect the other, particularly since California permits comment on a failure to testify. "Each of the defendants was entitled to have questions of this nature considered and decided by counsel independent of the interests of the other." *People* v. *Lanigan*, 22 Cal. 2d 569, 576, 140 P. 2d 24.

Finally, several witnesses failed to identify Douglas with the same clarity they identified Meyes (R. 106, 122, 127). Clearly, cross-examination of these witnesses would differ depending on whether counsel had an undivided interest in Douglas or in Meyes. See *Glasser*, 315 U.S. at pp. 72-73; *Craig* v. *United States*, 217 F. 2d 355, 359 (C.A. 6, 1954).

In short, there were many instances where joint counsel for petitioners would be torn by conflicting loyalty, where he would have to balance the interest of one against the other and where one or the other would be disadvantaged.

In addition, joint counsel would increase the danger—already a factor because of the joint trial—that Douglas would be so much identified with Meyes in the jury's eyes that he would be stigmatized by Meyes' conviction (R. 36), as well as by Meyes' belligerence and recalcitrance on the stand (see R. 38, 46-48, 90, for comparison of their demeanor). Indeed, it was already apparent in the colloquy on the motions at the outset of the trial that petitioners were being regarded indiscriminately as "they" and Douglas tarred with Meyes' conduct (see R. 41).*

---

* In *Glasser*, 315 U.S. at p. 76, this Court indicated that the burden on counsel of being forced to represent an additional de-

The trial court stated no reason for denying the motion for separate counsel (R. 36) and the appellate court did not advert to this issue at all. Respondent in this Court indicates that this motion too was dilatory and in bad faith (Resp. Br., pp. 17-18, 22-23). Here the public defender felt the need for separate counsel so strongly that even after the denial of his motion, he stated that his "conscience forced" him to re-assert the need (R. 41-42). The inference that the motions were dilatory seems to reflect the erroneous concept that the public defender did not have or feel the same duty of diligence as a retained attorney would, and made the various motions only because of petitioners' desire to avoid trial. And, as we already pointed out (p. 6), assuming *arguendo* that the Public Defender should have made the motion in more timely fashion, the petitioners cannot be penalized in their rights because of the neglect of their assigned counsel.

Thus the public defender was defeated in attempting to carry out his two cardinal obligations: preparation of his case and loyalty to his client. (See *Equal Justice for the Accused*, cited *supra* p. 6, at p. 56.) Petitioners were thus denied the effective aid of counsel and due process of law.

D. *Defendant's Opportunity to Retain Counsel*

Petitioner Douglas' motion for a continuance to retain counsel was denied on the mere basis that the motions for a continuance were made piecemeal (R. 36), even though this motion stemmed from the denial of the previous one for the appointment of separate counsel. Petitioner Doug-

---

fendant in itself deprived the defendants of effective aid. Particularly in view of the public defender's lack of opportunity to prepare, this factor must be considered, together with the conflict of interest between petitioners and the prejudice to Douglas from identification with Meyes.

las had contacted an attorney the day before the trial and had some assurance he could secure the attorney's services (R. 36, 46, 79); it was only on that day that the Public Defender discussed with petitioners the possible conflict of interest between them (R. 31).

When petitioner Douglas became aware—and if belatedly it was the fault of assigned counsel—of his need to retain counsel, he was not then given "a fair opportunity to secure counsel of his own choice." See *Powell* v. *Alabama*, 287 U.S. 45, 53; *Crooker* v. *California*, 357 U.S. 433, 439; *Melanson* v. *O'Brien*, 191 F. 2d 963, 968 (C.A. 1).

II.

California's Refusal to Furnish Petitioners With the Aid of Counsel in Their Appeals From Their Convictions, Violated the Constitutional Guarantees of Equal Protection and Due Process.

A. *Equal Protection*

Indigent defendants must have "the same opportunities" as those of means, to invoke appellate remedies. *Burns* v. *Ohio*, 360 U.S. 252, 257-8. A "State that does grant appellate review can (not) do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin* v. *Illinois*, 351 U.S. 12, 18.[5] The question therefore is whether and when a convicted indigent defendant suffers substantial disadvantage and discrimination in his appeal because of his inability to retain counsel. Is assignment of appellate counsel necessary to preserve equality between rich and poor in their subjection to penal measures?[6]

---

[5] And see *Smith* v. *Bennett*, 365 U.S. 708, applying the *Burns-Griffin* principle to a collateral post-conviction remedy.

[6] State practice varies as to supplying appellate counsel. See *People* v. *Brown*, 55 Cal. 2d 64, 69, note 1, 375 P. 2d 1072.

Under Federal *forma pauperis* practice, a defendant's appeal cannot be held frivolous unless he has been assigned counsel to determine if there is a basis for argument that the appeal is meritorious. And in the determination of an appeal on the merits, the necessity for the assignment of counsel is assumed without question. *Coppedge* v. *United States*, 369 U.S. 438. See also *Johnson* v. *United States*, 352 U.S. 565, 566. Since the purpose of *forma pauperis* procedure is the same as the purpose of the *Burns-Griffin* holding—that is, to equalize justice for the rich and poor—it could well be argued that equal protection requires the aid of counsel for an indigent before an appellate court can make even the determination of frivolity. For certainly a person of means has an advocate search the record to find a meritorious issue before he abandons his appeal and his hope of freedom from penal sanction. Compare *Anderson* v. *Heinze*, 258 F. 2d 479, 481 (C.A. 9), cert. den. 358 U.S. 889: the effective aid of counsel includes a search by counsel for meritorious issues.

In the case at bar, however, it is not necessary to go as far as considering whether the Federal *forma pauperis* rule is required by equal protection. For, the California holding is that even when an appeal is meritorious and presents on the face of the record issues of complexity and of Constitutional right—which are known to the appellate court—counsel can nevertheless be denied to an indigent. Upon such denial, the court itself is to research the record on behalf of the defendant (see *People* v. *Oliver*, 55 Cal. 2d 761, 770, 361 P. 2d 593), and consider whether error was committed.

(note 8 contd.)

A commentator suggests that logical application of the *Griffin* decision requires the State to supply counsel for an appeal by an indigent convicted defendant. Note, *Effect of Griffin* v. *Illinois*, 25 (1957) Chicago Law Rev. 162, 170-171.

California cannot mean or expect that appellate judges will so far depart from their customary roles and disciplined attitudes as to become whole-hearted advocates for appellant. At the most, on a realistic view of human possibilities, the appellate judges act as *amici curiae* for appellant. Compare *Ellis* v. *United States*, 356 U.S. 674, 675, where, in discussing representation of an indigent on his application for leave to appeal in *forma pauperis*, this Court said: "the two attorneys appointed by the Court of Appeals performed essentially the role of *amici curiae*. But representation in the role of an advocate is required." Though the State was represented in the instant appeal by an attorney and though he would be countered in a paying case by an advocate for the defendant, these defendants were deprived because of their poverty of an advocate's aid before the California bench.

The substantiality and complexity of the Constitutional issues presented by petitioners' appeals—and thus their need for appellate counsel—has already been indicated in Point I. And the appellate court's treatment of those issues will further indicate the role for appellate counsel in this case.

(1) In upholding the denial of a continuance for further preparation, the appellate court quotes the same remarks by the Public Defender as are quoted in respondent's brief in this Court; and like respondent indicates the motions were in bad faith (R. 184; Resp. Br., pp. 8-9, 14). A perusal of the record by an advocate would reveal that these remarks were taken out of context and do not accurately reflect the Public Defender's judgment on his need for preparation (pp. 4-6, *supra*), and would also reveal ample basis for an argument that the motion was made in good faith.

(2) Petitioner Douglas' need for counsel to emphasize the differences between him and Meyes is evidenced by the appellate court's statement that "defendants were obstreperous and insolent" (R. 193, note); this impression may well have stimulated the court's view that the motions for continuance were made in bad faith. As we already pointed out (p. 8, *supra*), the record reveals at the most an unruly attitude on the part of Meyes. The court's indiscriminate coupling of them, which copies respondent's practice in the trial court, is most unfair to Douglas.

(3) The appellate opinion takes no note whatsoever of the issue as to the need for separate counsel and the conflict of interest between petitioners.

Petitioner Douglas' argument that he needed separate trial counsel in order to secure effective aid was not presented in petitioner Meyes' *pro se* brief, which the appellate court stated was submitted for both of them (R. 192). Respondent noted the motion for separate counsel only to argue that it had not been made in good faith, basing this argument on the non-sequitur that Douglas stated at one point that "he was prepared" for trial (Petr's brief in this Court, p. 19, note).

Because Douglas was unrepresented and no argument was held in the appellate court, an important California decision on the conflict of interest question was not formally brought to the court's attention, let alone argued to it (*ibid.*).

(4) The appellate court takes no note of Douglas' motion for a continuance to retain trial counsel (discussed pp. 9-10, *supra*).

(5) Neither does the appellate opinion mention the issue of whether Douglas should have been supplied with a trial

transcript for the purposes of his appeal (discussed in Petr's brief in this Court, pp. 3-4). There may have been reasons under the prison conditions in California why he could not obtain it from Meyes, or he may have attempted to do so and failed. Whether supplying the transcript to Meyes afforded Douglas an adequate opportunity to appeal under the *Burns-Griffin* rule, was itself an issue that could not be determined without counsel.

Only a word need be said about the appellate court's remark in support of its refusal of appellate counsel, that Meyes' *pro se* briefs "present all possible points clearly and ably . . . " (R. 193). This case illustrates the difficulty of a court's making such an evaluation without assigning counsel, since Meyes did not, as respondent concedes, make any presentation of the important conflict of interest point (see Petr's Br., p. 19, note). And legal craftsmanship does not consist merely of the citation of cases with which prison-written briefs abound.[9]

At least where there are meritorious issues of some complexity, including Constitutional questions as in this case, the State denies equal protection when it refuses the aid of counsel for an indigent defendant's appeal. Certainly a layman cannot adequately represent himself on such issues of law. See *Johnson* v. *Zerbst*, 304 U.S. 458, 467. Nor can the appellate judges adequately represent appellant. There is great discrepancy in the opportunity to secure an appellate remedy for injustice and error, between a case where appellant is represented by an advo-

---

[9] Cf. Cardozo, *Nature of the Judicial Process* (Yale Univ. Press, 1921) pp. 20-21: "Some judges . . . match the colors of the case at hand against the colors of many sample cases . . . But, of course . . . no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it."

cate and the instant case where the court attempts to represent appellants' interests as well as to judge them. Compare *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214; *People* v. *Breslin*, 4 N.Y. 2d 73, 82 (Fuld, *J.* dissenting): the court cannot examine the record "as carefully or as critically as single-minded counsel for the appellant"; *Carnley* v. *Cochran*, 369 U.S. 506: "As must generally be the case, the trial judge could not effectively discharge the roles both of judge and defense counsel."

Such a radical difference on the basis of wealth in the opportunity to secure appellate justice is not tolerable under the equal protection clause.

B. *Due Process*

Regardless of the dictum in *McKane* v. *Durston*, 153 U.S. 684, 687-8, that a State was not constitutionally obliged to create appellate procedure because it had not existed at common law, review as of right of felony convictions is a long-established part of the system of justice throughout the United States.

It would offend our basic concept of justice if, when a grave crime and grave punishment is at stake, the defendant had no right to appeal.

"An appeal where grounds exist is an inseparable part of the process through which the individual's guilt or innocence of the charges brought against him by the state is established." *Equal Justice for the Accused*, cited *supra* p. 6, at p. 61. "Gaining reversal of an improper conviction is no less vital to a defendant whose liberty . . . (is) at stake than . . . obtaining an acquittal from the jury in the first instance." *People* v. *Breslin*, 4 N.Y. 2d 73, 81 (Judge Fuld dissenting).

For the presiding judge to have the sole say as to the correctness of his conduct and rulings—rulings made, moreover, in the heat and haste of trial—would be basically unfair. Compare *Rexford* v. *Brunswick-Balke Co.*, 228 U.S. 340, 343-344, as to appellate judge's review of question he considered below; compare *In re Oliver*, 333 U.S. 257, 284-285. We urge that due process requires some means of assuring in a grave criminal case, besides the edicts of the sitting judge, that the defendant is given a "trial according to some settled course of judicial proceeding." See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280. Since trial errors as such are not Constitutional violations correctible by habeas corpus, appellate review is the only assurance that defendants are accorded the procedure due them under State law.

As to an unconstitutional conviction, this Court has said many times that the State must there furnish a remedy.[10] If it were to afford only a collateral remedy—new proceedings which the convict must initiate—an indigent without counsel is at a grave disadvantage; he is likely to acquire the knowledge and means of bringing the proceeding only after a long interim, if at all. Thus, we urge that due process requires an appellate remedy for an unconstitutional felony conviction as well as for errors which do not rise to the level of a constitutional violation.

If, as we have argued, due process requires the State to furnish an opportunity for appellate review of a felony conviction, more than the mere formality of review is required. Counsel must be assigned to an indigent, at least when the "circumstances of a defendant or the difficulties involved in presenting a particular matter are such that

---

[10] *Mooney* v. *Holahan*, 294 U.S. 103, 113; *Moore* v. *Dempsey*, 261 U.S. 86, 91.

a fair and meaningful hearing cannot be had without the aid of counsel." *Dillon* v. *United States*, decided Aug. 22, 1962 (C.A. 9), 31 USLW 2120. As we have already pointed out (*supra*, pp. 12, 14-15), the appellate issues here were complex, and a fair review required the aid of counsel.

The question of whether due process demanded the assignment of counsel to petitioners for their appeal can also be approached from another standpoint.

Whatever judicial procedure the State establishes must be administered fairly. Since the State provided an appellate court which "considers questions raised under the Federal Constitution, the proceedings in that Court are a part of the process of law under which the petitioners' convictions must stand or fall" and must be fairly conducted. *Cole* v. *Arkansas*, 333 U.S. 196, 201-2. The appellate proceedings "are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires . . . The appeal here was but a continuation of petitioner's defense which began in the trial court." *National Union* v. *Arnold*, 348 U.S. 37, 45-6 (dissent). See also *Beck* v. *Washington*, 369 U.S. 541; *Lawn* v. *United States*, 355 U.S. 339, 349-350.

The appellate procedure is not administered fairly when, as in the instant case, there is one-sided advocacy on complex legal issues—on behalf of the prosecution, but not on behalf of the defendant.[11]

---

[11] Another due process approach to the question of assignment of counsel is that the adversary method is an established part of California's appellate procedure, and petitioners are therefore entitled to its benefits along with other litigants. Compare *Accardi* v. *Shaughnessy*, 347 U.S. 260, 268.

Conclusion

It is respectfully submitted that the judgments should be reversed and a new trial ordered.

Respectfully submitted,

MARVIN M. MITCHELSON
BURTON MARKS
Attorneys for Petitioners

A. L. WIRIN
FRED OKRAND
NANETTE DEMBITZ
of Counsel